ment of the action. Therefore, where no new cause of action is introduced by an amendment, but the amendment simply completes the statement of the cause which the pleader meant to set forth when the declaration was prepared and filed, the statute of limitations is satisfied if the declaration was filed before the action was barred. Holton *v.* The Western Union Telegraph Co., 19 S. E. Rep. 843, 94 Georgia 435. An amendment within the power of the court to allow, is not the beginning of a new action, so as to subject the suit to the operation of the statute of limitations, which was not a bar at the time of instituting the action. Guild *v.* Parker, 43 N. J. L. (14 Vroom) 430. Where an additional count, filed long after the commencement of the action, is a mere restatement, by way of amendment to the cause of action set up in the original counts, the additional count does not introduce a new cause of action, and the statute of limitations is not a good plea when the original action was begun in apt time. Blanchard *v.* Lake Shore & M. S. Ry. Co., 126 Ill. 416, 18 N. E. 799. In Culp *v.* Steere, 28 Pac. 987 (Kas.) the action was brought within proper time, so as not to be barred by any statute of limitations but the amendment was not made until more than three years had elapsed after the purchase and sale of a horse, and the plaintiffs recovered in the action. It was held, that the cause of action upon which the plaintiffs recovered was not barred by any statute of limitations. Link *v.* Jarvis, 33 Pac. (Cal.) 206, contains the following remark on this subject. "An amended complaint relates back to the commencement of the action, if a new cause of action is not pleaded, and new parties are not brought in; and in such case the statute ceases to run when the original complaint is filed. Barber *v.* Reynolds, 33 Cal. 497; Allen *v.* Marshall, 34 Cal. 165; Lorenzana *v.* Camarillo, 45 Cal. 125." As to when a general direction as to when an act is begun so as to stop the running of the statute of limitations, see 12 Law Reg. 675.

CLEAR CREEK WATER CO., Inc., *v.* GLADEVILLE IMP. CO.

Sept. 12, 1907.

[58 S. E. 586]

1. Eminent Domain—Extent of Power—Acquisition of Water Rights—Statutes.—Under Va. Code, 1904, § 1105c, cl. 2 (f), authorizing public service corporations to condemn "sand, earth, gravel, water or other material," and sections 1105f (4) and 1105f (5), prescribing the procedure for condemning any "land or other property or any interest or estate therein," and section 1105f (9), as amended by Acts 1906, p. 452, c. 257, providing that, on the payment of the compensation awarded and the confirmation of the report of the commissioners in proceedings to condemn property, the title shall vest in the petitioner, and declaring that nothing in the act shall authorize the condemnation of a less estate in the property taken than is owned by the party against whom the proceeding is instituted, which revises the law on the subject as embodied in Code 1873, c. 56, § 11, and Code 1887, c. 46, § 1079, a public service corporation may condemn a partial

interest in land when a partial interest only is needed, and a public service water company may condemn the water rights of an inferior riparian proprietor, by condemning the right to divert water without condemning the land over which it flows.

2. Same.—A public service water company sought to condemn the water rights of an inferior riparian owner without invading the land of the latter, and only desired to divert the water of a stream flowing through his land. The riparian owner owned the estate in fee simple, and his riparian rights were appurtenant to and coextensive with the estate. Held, that the company must participate in the water of the stream on the basis that the riparian owner's rights in the water were appurtenant to his estate, and must expropriate the perpetual easement of the owner therein.

Appeal from Circuit Court, Wise County.

Proceedings by the Clear Creek Water Company, Incorporated, to condemn a water right of the Gladeville Improvement Company. From a judgment sustaining a demurrer to the petition and dismissing the proceeding, the petitioner appeals. Reversed.

Bullitt & Kelly and *Jno. W. Chalkey,* for appellant.
Vicars & Peery, for appellee.

WHITTLE, J. The plaintiff in error, the Clear Creek Water Company, Incorporated, a public service corporation having authority to condemn lands, water, water rights, or any other property, and any estate or interest therein, for its uses and purposes, filed its petition in the circuit court of Wise county against the defendant in error, the Gladeville Improvement Company, an inferior riparian proprietor, under chapter 46b, Va. Code 1904, for the purpose of condemning certain riparian rights of the defendant in error in Clear creek, by intercepting and diverting all the waters in said creek and the two main forks thereof (or as much as would flow through a 12-inch pipe) into and through the plaintiff in error's pipe line at the point of its proposed intake, dams, and reservoir, above the lands of the defendant in error, to supply the inhabitants of the town of Norton with water for domestic purposes.

There was a demurrer to the petition, and the circuit court, "being of opinion that the law does not authorize a water company to condemn a water right only, but that it must, if it condemns at all, condemn the whole interest owned by the defendant, that is, the land itself," sustained the demurrer and dismissed the petition.

That this ruling is a correct exposition of the law as it was under the Codes of 1873 (chapter 56, § 11) and 1887 (chapter 46, § 1079) is admitted. Indeed, the provisions referred to (which are identical) were so construed by this court in the cases of City of Roanoke *v.* Berkowitz, 80 Va. 616, and City of Charlottesville *v.*

Maury, 96 Va. 383, 31 S. E. 520. In the latter case the court observes: "It may be true, as counsel for the city earnestly contend, that it is a great hardship upon the city to be compelled to condemn and pay for property which it does not need in order to get what is necessary for its purposes. This is an argument more properly addressed to the Legislature than the courts."

It is suggested that these decisions accentuated the necessity for a more liberal policy and induced the Legislature to revise the law and adopt the rule which at present obtains. However that may be, the statutes now in force manifest a legislative purpose to confer upon public service corporations the power to condemn interests in land other than the entire interest, when a partial and not the entire interest is needed for the purposes of the corporation.

Thus Va. Code 1904, § 1105c, cl. 2 (f), authorizes such corporations, "in the manner and subject to the limitations provided by the general statutes * * * for the condemnation of land," to condemn for their purposes "sand, earth, gravel, water, or other material"; and sections 1105f (4) and 1105f (5) prescribe the procedure for condemning any "land or other property, or any interest or estate therein." This phraseology characterizes the various provisions of chapter 46b, and differentiates them from the statutes construed in the cases cited.

Section 1079 of the Code of 1887 declares that upon the payment to the parties entitled thereto, or into court, of the sum ascertained by the commissioners as a just compensation for the land taken and for damages to the residue of the tract, "the title to that part of the land for which compensation is allowed shall be absolutely vested in the company * * * in fee simple, except in the case of a turnpike company, when a sufficient right of way only for the purposes of said company shall be vested"; while the corresponding provision of the present statute (section 1105f (9), as amended Acts 1906, p. 452, c. 257), is as follows: "Upon such payment, either to the person entitled thereto or into court, and confirmation of the report, the title to the part of the land, and to the other property for which compensation is allowed, shall be absolutely vested in the company, in fee simple, except in the case of a turnpike company, when a sufficient right of way only for the purpose of such company shall be used, and except also the case of any other company, when, if the notice of the application to the court shall so specify or describe, and the petition shall so pray, the interest or estate as shall be so specified and prayed for shall be vested. *Nothing in this Act contained shall be construed as authorizing the condemnation of a less estate in the property taken than is owned by the party against whom the proceeding is.*" The italicized words constitute the limitation imposed by the amendment in Acts 1906, p. 452, c. 257.

Among other definitions, Bouvier observes that "estate" "signifies that quantity of interest which a person has, from absolute ownership down to naked possession." It is in this sense that the term is employed in the amended act of 1906. It denotes the quantity of interest of the owner in the subject sought to be condemned. Prior thereto it might have been competent to carve an inferior estate (e. g., an estate for life or years) out of the fee simple, and to have condemned the lesser estate, leaving the reversion in the owner. The purpose of the amendment was to abolish a provision so obviously unjust to the owner, and to require the condemnation of the entire estate in the property proposed to be taken.

It will be noticed that the word "interest" does not occur in the amendment. So far as the "interest" which may be condemned is concerned, the statute is left intact. The amendment deals only with the "estate." Authority to condemn interests in "any land, sand, earth, gravel, water, or other material" is left unimpaired; but the entire estate in such parts of these various subjects as is proposed to be taken, whatever that estate may be, must be condemned.

In this instance the plaintiff in error's water mains are to connect with a reservoir above, and will not invade the land of the inferior riparian owner. The company needs to intercept and divert the water of the stream for its purposes, but has no occasion to use the bed of the creek, and may not, therefore, be required to condemn the land over which the water flows. But the defendant in error owns an estate in fee simple in the lower premises, and its riparian rights in the water are appurtenant to and coextensive with that estate. The condemning company must therefore participate in the water of the stream on that basis, and expropriate the perpetual easement of the defendant in error therein.

Interests in water, as well as in land, are subject to the law of eminent domain. Hamor *v.* Bar Harbor Water Co., 78 Me. 127, 3 Atl. 40. Such interests are indispensable to water companies, and when the waters of a stream are diverted, the inferior riparian proprietor is entitled to compensation for the use of the water of which he is deprived. This principle is illustrated by numerous decisions. The following have more or less pertinency to the case in judgment: Cooper *v.* Williams, 5 Ohio, 391, 24 Am. Dec. 299; Gilzinger *v.* Saugerties Water Co., 66 Hun, 173, 21 N. Y. Supp. 121; Smith *v.* City of Rochester, 92 N. Y. 463, 44 Am. Rep. 393; Heilman *v.* Union Canal Co., 50 Pa. 268; Stein *v.* Burden, 24 Ala. 130, 60 Am. Dec. 453; Burden *v.* Stein, 27 Ala. 104, 62 Am. Dec. 758; Trenton Water Power Co. *v.* Raff, 36 N. J. Law, 335; Avery *v.* Fox, Fed. Cas. No. 674, 1 Abb. (U. S.) 246.

The remaining ground of demurrer, based on the alleged in-

sufficiency of the plat which the statute requires shall accompany the petition, is not sustained by the record, and was properly overruled.

Upon the whole case, we are of opinion that the law on the demurrer to the petition is with the plaintiff in error, and it must, consequently, be overruled, and the case remanded for further proceedings.

Reversed.

Note.

This is the first time that section of the Code, passed no doubt at the suggestion of the court in Charlottesville *v.* Maury, 96 Va. 383, has been before the court for construction, and Judge Whittle decides that those enactments confer upon public service corporations the power to condemn interests in land other than the entire interest, when a partial and not the entire interest is needed for the purposes of the corporation. The court's construction of this statute will undoubtedly meet with the approval of all, and furnish an excellent opportunity for the court to apply that well known rule in the construction of statutes that the primary object in the interpretation of statutes is to ascertain and give effect to the intention of the lawmakers, and for that purpose they may consider the old law, the mischief and the remedy. At the same time and to avoid the injustice that might result to the owner from a too narrow construction of the term "estate used" in the limitation, they held that it required the condemnation of the entire estate in the property proposed to be taken, and that it was not competent to carve an inferior estate (e. g., an estate for life or years) out of the fee simple, and to have condemned the lesser estate, leaving the reversion in the owner; thus applying that fundamental principle in the construction of statutes that wherever a statute is capable of two constructions, one of which would work manifest injustice, and the other would work no injustice, it is the duty of the court to adopt the latter, as it can scarcely be presumed that an injustice was in the legislative intent.

HART *et al. v.* DARTER *et al.*

Sept. 12, 1907.

[58 S. E. 590.]

Wills—Equity—Jurisdiction—Construction of Wills.—Testator devised all his lands to his six living children, and provided that "if one sells, sell it to one of six, and if one dies with esue, its part shall go to the other children." Held, that a court of equity was without jurisdiction of a bill to construe such clause of his will, and to have it adjudged that the words "with esue" meant "without issue," and determine whether devisees could sell to persons other than devisees; devisees under such clause of the will obtaining purely legal titles, and the construction of wills not being of itself a ground of equity